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In The

Supreme Court of the United States

October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case No. 93SA017

BRIEF IN OPPOSITION

JEAN E. DUBOFSKY, P.C.
JEAN E. DUBOFSKY*
1881 Ninth Street, Suite 210
Boulder, CO 80302
(303) 447-3510

Attorneys for Respondents

*Counsel of Record

[Additional counsel for Respondents listed on inside front cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

Additional Counsel for Respondents:

JEANNE WINER
Attorney at Law
1942 Broadway,
Suite 404
Boulder, CO 80302
(303) 938-6836

GREGORY A. EURICH
HOLLAND & HART
555 17th Street,
Suite 2900
P.O. Box 8479
Denver, CO 80201
(303) 295-8166

DAVID H. MILLER
American Civil Liberties
Union of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

MATTHEW A. COLES
WILLIAM B. RUBENSTEIN
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800, Ext. 545

CLYDE J. WADSWORTH
WILSON, SONSINI, GOODRICH
& ROSATI
2 Palo Alto Square
Palo Alto, CA 94306
(415) 493-9300

SUZANNE B. GOLDBERG
Lambda Legal Defense and
Education Fund, Inc.
666 Broadway
New York, NY 10012
(212) 995-8585

CITY AND COUNTY OF DENVER
CITY ATTORNEY
DARLENE M. EBERT
Assistant City Attorney
1445 Cleveland Pl.,
Room 303
Denver, CO 80202-5375
(303) 640-2931

BOULDER CITY ATTORNEY
JOSEPH N. DE RAISMES, III
JANE W. GREENFIELD
P.O. Box 791
Boulder, CO 80306
(303) 441-3020

QUESTION PRESENTED FOR REVIEW

Whether this Court should review, during the course of on-going state court proceedings, an interim ruling of the Colorado Supreme Court that affirms the issuance of a preliminary injunction, where the basis for the injunction of a state constitutional amendment that would exclude from the political process gay men, lesbians and bisexuals as an identifiable group preserves the status quo pending resolution of the underlying lawsuit and is consistent with this Court's precedents.

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The opinion of the district court (pet. app. B) granting the preliminary injunction is not reported. The opinion of the Colorado Supreme Court (pet. app. A) affirming the district court's preliminary injunction is reported at 854 P.2d 1270 (Colo. 1993).

JURISDICTION

As discussed *infra* at 5, respondents contend that this Court lacks jurisdiction to review the decision of the Colorado Supreme Court because that decision is not a final judgment as required by 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On November 3, 1992, a majority of Colorado voters approved a voter-initiated ballot measure to amend the Colorado Constitution. The amendment, known popularly as Amendment 2, provides that:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This

Section of the Constitution shall be self-executing.

The amendment deprives all branches of state government (the legislative, executive, and judicial), state agencies (including state universities and colleges), political subdivisions (including counties), municipalities and school districts of the power to remedy "any claim of discrimination" based on "homosexual, lesbian or bisexual orientation." Amendment 2 also repeals various statutes, policies, and local ordinances that prohibit discrimination on the basis of sexual orientation.

On November 12, 1992, the respondents (hereinafter "the plaintiffs") filed suit in Denver District Court. The plaintiffs sought a declaration that Amendment 2 was unconstitutional under the United States Constitution and an injunction to prevent the petitioners (hereinafter "the state") from enforcing the amendment. The individual plaintiffs alleged that Amendment 2 violated several provisions of the U.S. Constitution, including the equal protection clause of the Fourteenth Amendment, the free speech and petition clauses of the First Amendment, the supremacy clause, and the right to due process protected by the Fourteenth Amendment. The plaintiff cities sought a declaratory judgment about the effect of Amendment 2 on their home rule powers. The plaintiff school district sought a declaratory judgment about the effect of Amendment 2 on its policies to protect gay and lesbian students from discrimination.

Under Colorado law, Amendment 2 was to become effective January 14, 1993. To prevent Amendment 2 from becoming effective, the plaintiffs advanced three of their

numerous legal theories in a motion for preliminary injunction. First, they argued that Amendment 2 should be subjected to strict scrutiny under the equal protection clause because Amendment 2 burdens a fundamental right to participate in the political process. Second, the plaintiffs contended that Amendment 2 violates the equal protection clause even without strict scrutiny because it bears no reasonable relation to any legitimate governmental purpose. Finally, the plaintiffs contended that Amendment 2 violates the free speech clause of the First Amendment.

On January 15, 1993, after a four-day hearing, the district court granted the plaintiffs' motion for a preliminary injunction. The district court determined that Amendment 2 burdened "the right not to have the State endorse and give effect to private biases." B-20. The district court temporarily enjoined the state from enforcing Amendment 2 until resolution of the plaintiffs' claims on the merits.

The state sought interlocutory review of the preliminary injunction before the Colorado Supreme Court. On July 19, 1993, the Colorado Supreme Court upheld the trial court's grant of preliminary injunctive relief. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

The Colorado Supreme Court ruled that the plaintiffs had a reasonable likelihood of prevailing on the merits of their claim that Amendment 2 violated the Fourteenth Amendment's equal protection clause because Amendment 2 burdened a fundamental right to participate in the political process. *Evans*, 854 P.2d at 1286. Because Amendment 2 burdened a fundamental right, the court held that

"Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause." *Id.* Noting that "the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings," the Colorado Supreme Court upheld the trial court's preliminary injunction and remanded the case to the trial court for a determination on the merits of all of the plaintiffs' claims and the state's affirmative defenses. *Id.*

On August 16, 1993, both parties indicated in disclosure certificates that they planned to assert at trial federal claims or affirmative defenses not yet addressed by either the trial court or the Colorado Supreme Court. The plaintiffs contended in their disclosure certificate that Amendment 2 discriminated against a suspect or quasi-suspect class and, therefore, was subject to some sort of heightened scrutiny. The plaintiffs also contended that Amendment 2 is not rationally related to a legitimate purpose and violates the free speech and petition clauses of the First Amendment. The state contended that Amendment 2 was narrowly tailored to serve compelling government interests and, therefore, would survive the strict judicial scrutiny required by the Colorado Supreme Court. The state's disclosure certificate listed six interests that allegedly were compelling and disclosed numerous expert and lay witnesses who would testify about the compelling weight of these interests.

Trial on the merits of the plaintiffs' claims began on October 12, 1993 and will end on October 22. Both sides are calling numerous fact and expert witnesses to establish the record on which the plaintiffs' legal claims will be

determined. The trial court has not yet issued any findings of fact or conclusions of law on the merits of any of the plaintiffs' federal claims or the state's affirmative defense that Amendment 2 is narrowly tailored to serve a compelling interest. Only the propriety of a preliminary injunction has been decided by the Colorado Supreme Court.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION BECAUSE THE COLORADO SUPREME COURT'S INTERIM RULING UPHOLDING THE DISTRICT COURT'S ENTRY OF A PRELIMINARY INJUNCTION IS NOT A FINAL JUDGMENT OR DECREE WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

The state seeks review by this Court of an interim ruling by the Colorado Supreme Court that upholds a preliminary injunction granted by a state trial court pending the outcome of a trial that is currently under way. Review of such a non-final order is beyond the scope of this Court's jurisdiction, would be wasteful of judicial resources, and would undermine principles of federalism.

28 U.S.C. § 1257(a) provides the statutory basis for this Court's jurisdiction to review decisions of state courts by writ of certiorari:

> "*Final* judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

(emphasis added). Thus, this Court may review only "final judgments or decrees" of a state court. As the Colorado Supreme Court's decision at issue is not a final judgment or decree under 28 U.S.C. § 1257(a), this Court lacks jurisdiction and the Petition for Writ of Certiorari should be denied.

The interim ruling below – which affirms the trial court's award of an injunction preliminarily enjoining the enforcement of state law – is not final "in the sense that no further proceedings can possibly take place in the state judicial system." *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120 (1981) (state court judgment not final for purposes of section 1257 where additional proceedings in state trial court could significantly affect outcome of federal issues presented in certiorari petition). On the contrary, the interim ruling simply affirmed an injunction that preserved the status quo pending a full trial on the merits of the plaintiffs' claims. That trial, which began on October 12, 1993, is on-going at the time of this filing. Under traditional principles of finality, such an affirmance of a preliminary injunction is not a final judgment: the preliminary injunction does not finally dispose of the case on the merits, and proceedings on the merits remain to be had in state court.[1]

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[1] *See, e.g., Montgomery Bldg & Construction Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178, 180-81 (1952) (holding that Alabama Supreme Court's decision upholding state trial court's preliminary injunction of labor organization's picketing activities is not final order and noting that "from the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees [such as preliminary injunctions]").

Not surprisingly, the state has cited no case in which this Court has intervened in ongoing state proceedings to review a preliminary injunction affecting the operation of a state law in favor of asserted federal rights. "Normally the finality doctrine . . . is not satisfied if the state courts must conduct further substantive proceedings before the rights of the parties as to the federal issue are resolved." *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987); *see also Minnick*, 452 U.S. at 120.

The state is correct in noting that, under certain, limited circumstances, this Court may consider a state court decision to be final for purposes of section 1257 even though further proceedings are anticipated in the lower state courts. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court described four categories of cases in which immediate review may be appropriate. This case does not fall into any of those exceptions to the finality doctrine.

A. The interim ruling does not preordain the outcome of this case or conclude it for all practical purposes.

In the first *Cox Broadcasting* category are those cases in which "the federal issue is conclusive or the outcome of further proceedings preordained" so that "the case is for all practical purposes concluded." 420 U.S. at 479. The first *Cox* category is inapplicable to this case because the federal issue addressed by the Colorado Supreme Court in affirming the preliminary injunction is not conclusive of the merits, and the outcome of further proceedings in state court is not "preordained." *Id.* The interim ruling

below did not decide – and could not have decided – several federal questions that are currently being tried by the state court. Moreover, the interim ruling with respect to the single federal issue addressed did not conclusively resolve even that issue because the court did not apply the articulated legal standard to the facts in this case.

The interim ruling below did not address all of the plaintiffs' federal claims because the plaintiffs moved for preliminary relief only on some of them. The interim ruling addressed the theory that Amendment 2 unconstitutionally burdened a fundamental right to participate in the political process. The federal claims that are not addressed by the interim ruling – and remain pending in the district court – include claims that Amendment 2 (1) unconstitutionally discriminates against a suspect or quasi-suspect class of gay men, lesbians, and bisexuals in violation of the equal protection clause; (2) serves no legitimate purpose under *any* level of equal protection review; (3) unconstitutionally restricts speech under the First Amendment; and (4) unconstitutionally restricts the right to petition the government under the First Amendment. Therefore, it cannot be said that "because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is final." *Cox Broadcasting*, 420 U.S. at 479.

The first *Cox Broadcasting* category is also inapplicable because there has yet to be a determination by any state court as to application of the legal standard to the facts of the case – namely, whether Amendment 2 serves a compelling interest through the least restrictive means. Until the Colorado Supreme Court makes such a determination, there cannot be a final state court judgment

defining the rights of the parties even on the single legal theory addressed by that court.

The state suggests that, because the Colorado Supreme Court's decision places a heavy burden on the state, the case is for all practical purposes concluded within the meaning of the first *Cox Broadcasting* category. This suggestion is meritless. The burden of proving a compelling state interest is not so insurmountable that requiring such proof preordains the outcome of any case. Indeed, this Court repeatedly has upheld state laws on the ground that such laws served a compelling state interest, even when such laws burden a fundamental right. *See, e.g., Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5, 14-15 (1992), and cases cited therein.

The state's suggestion that the interim ruling preordains the outcome of the trial is also inconsistent with the state's declarations before the trial court. The state has contended in its disclosure certificate that Amendment 2 serves at least six compelling state interests and that the trial court may uphold Amendment 2 even under the strict judicial scrutiny required by the Colorado Supreme Court's ruling. Far from conceding that the outcome of further proceedings is "preordained" by the interim decision below, the state has provided summary statements and affidavits for over two dozen expert witnesses, ranging from psychiatrists to political scientists[2]. These witnesses began to testify in support of the state's proffered interests on October 15, before the date on which this

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[2] The state moved for summary judgment, arguing that it was entitled to judgment on the merits of its affirmative defense that Amendment 2 serves a compelling governmental interest.

Opposition to the State's Petition for Certiorari Review has been filed.

Therefore, the state itself effectively concedes that the case is *not* "for all practical purposes concluded" by the Colorado Supreme Court's interim ruling. To the contrary, if the state succeeds in its stated intention of proving that Amendment 2 serves a compelling state interest by the least restrictive means, Amendment 2 will be upheld and this Court's determination of the issues raised in the Petition will be unnecessary.

B. The remaining proceedings in state court will give rise to additional federal questions not yet addressed by the Colorado Supreme Court.

This Court may find finality under the second *Cox Broadcasting* exception only if the "remaining issues [to be decided in further state court proceedings] will not give rise to *any* further federal questions." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612 (1989) (emphasis added). There are several federal claims that are pending, that have never been addressed by any state court, and that will be decided by the trial court after a hearing on the merits. Those include claims that Amendment 2 (1) discriminates against a suspect or quasi-suspect class in violation of the equal protection clause; (2) serves an illegitimate purpose of advancing private bias, in violation of any standard of equal protection review; (3) deprives the plaintiffs of their right to petition the government under the First Amendment; and (4) chills speech in violation of the First Amendment. Because the scheduled trial in this case will "require the decision of other federal questions that also

might require review by the Court at a later date," *Cox Broadcasting*, 420 U.S. at 478, the interim ruling is not a final disposition of all the federal questions in this case.

Indeed, to review only the question decided in the interim ruling would invite piecemeal review that the requirement of finality is intended to avoid. *See, e.g., North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). Assuming *arguendo* that this Court were to reverse the interim ruling below, the plaintiffs would still seek a determination from the trial court pursuant to this Court's holding *and* with respect to their other federal claims. This Court would then face another appeal in this case from the Colorado Supreme Court's disposition of those additional ~~federal~~ issues. Such piecemeal review of the federal claims in a single case wastes judicial resources. *See, e.g., Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). Moreover, interlocutory interference with state court proceedings is contrary to the policy of federalism that the doctrine of finality is intended to advance. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

C. Later review of this case can be had after a final judgment on the merits.

This case also does not fall into the third *Cox Broadcasting* exception to the strict finality requirement. The state has not alleged that this is a case where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 480. This Court will be able to review all of the federal questions in this

case on a complete record after the trial court enters findings of fact and conclusions of law and those findings and conclusions are reviewed by the Colorado Supreme Court.

D. The Colorado Supreme Court's interim ruling enjoining a state law to protect asserted federal rights does not threaten any federal policy with erosion.

Finally, the *Cox Broadcasting* Court stated that "if refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 483. The purpose of this category is to allow immediate review where some federal policy may be threatened by an interlocutory state court decision finding that federal law is inapplicable.[3]

This fourth *Cox Broadcasting* exception has no application to this case because the ruling below affirming an injunction does not threaten any *federal* policy. The trial court in this case enjoined a *state* law – Amendment 2 – in

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[3] *See, e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (immediate review allowed where state court enjoins Nazi's march that may be protected by First Amendment); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971) (immediate appeal allowed where state court temporarily enjoins circulation of leaflets because temporary injunction has "marked impact on petitioners' First Amendment rights"); *see also Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984); *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963).

order to protect *federal* constitutional rights. The state supreme court affirmed this injunction of state law.

The state does not contend that there is a federal interest in enforcing Amendment 2 that must be protected by immediate review. The injunction may erode the *state's* interest in enforcing Amendment 2, but that interest is committed by long-standing principles of federalism to the care and sound discretion of the state judiciary, not to the oversight of the United States Supreme Court. *Cf. Murdock v. Memphis*, 20 Wall. 590 (1875) (noting that state courts are traditionally committed with authority over state law).

None of the cases cited by the state involves an instance in which this Court, in order to protect a purely state interest, granted immediate review of a state court decision affirming a state trial court's preliminary injunction of state law. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), for instance, this Court granted immediate review of an Illinois court's issuance of a temporary injunction enjoining the state from distributing leaflets protesting alleged efforts to induce white residents to sell their property in a particular neighborhood. Unlike the instant case, in *Keefe* there was no "indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing." 402 U.S. at 418 n.1. The Court noted that "the temporary injunction here, which has been in effect for over three years, has already had marked impact on the petitioners' First Amendment rights." *Id.*

Because the Illinois court in *Keefe* enjoined activities protected by the First Amendment to the U.S. Constitution, the state court's injunction eroded the federal right of free speech. By contrast, the interim ruling here affirming a state court injunction does not impinge upon a federal right. There is, therefore, no need for immediate review by this court. Assuming *arguendo* that the Colorado Supreme Court erred and construed the federal right in question too broadly, this Court can correct any such error by the normal method – by reviewing a final judgment on the merits of *all* of the plaintiffs' federal claims.

The other two cases cited by the state involving interlocutory review of preliminary injunctions are less relevant than *Keefe*. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), involved a federal district court's injunction of state law; *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), involved a federal district court's preliminary injunction of a federal statute on constitutional grounds. Neither case sheds any light on this Court's jurisdiction to review *state courts'* preliminary injunctions. The concerns of federalism that underlie the finality doctrine when this Court reviews state court decisions under 28 U.S.C. § 1257 are inapplicable to injunctions issued by *federal* courts.[4] Therefore, instances of this Court's review

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[4] *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945) (noting that finality doctrine "derives added force when the jurisdiction of this Court is invoked to upset the decision of a *State* court" because of considerations of federalism and comity) (emphasis added); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L Rev. 1004, 1012-13 (1978) ("One manifestation of these federalism concerns is the notion

of preliminary injunctions issued by federal courts say little about the compelling requirements of finality under 28 U.S.C. § 1257(a).

Cases dealing with this Court's review of federal courts' preliminary injunction orders are not relevant to review under 28 U.S.C. § 1257 because this Court's jurisdiction to review lower federal courts is governed by different statutory provisions. Unlike 28 U.S.C. § 1257, the statutes controlling jurisdiction to review lower federal courts' rulings explicitly allow U.S. Circuit Courts of Appeals and thus the U.S. Supreme Court to review grants of preliminary injunctions by federal district courts. *See* 28 U.S.C. § 1292(a)(1). Indeed, this Court's jurisdiction over lower federal courts is not limited by any finality requirement at all, unlike its jurisdiction over state courts. *See* 28 U.S.C. § 1254 (authorizing Supreme Court review of decisions by U.S. Courts of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, *before or after rendition of judgment or decree*") (emphasis added).

Thus, this Court's decisions construing statutes that explicitly allow review of interlocutory orders provide no guidance on the meaning of 28 U.S.C. § 1257, which contains an explicit finality requirement. For instance, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305

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that the Court, in deciding whether to hear an appeal brought under section 1257, should exhibit a heightened solicitude for the integrity of the trial process because of possible state sensitivity about interlocutory supervision by the federal judiciary.").

(1985) – cited by the state – involved this Court's construction of 28 U.S.C. § 1252, a statute (now repealed) that explicitly provided this Court with jurisdiction to review *"an interlocutory or final judgment . . .* of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." (emphasis added) Not surprisingly, the *Walters* Court found that this statute provided it with jurisdiction over an interlocutory appeal of a federal district court's preliminary injunction. It is difficult to see what relevance *Walters* has to the construction of 28 U.S.C. § 1257, which, unlike 28 U.S.C. §§ 1254 and 1252, contains an explicit finality requirement and no authorization to review state court interlocutory judgments.

The state does not offer any reason for granting immediate review except that it would like to avoid "the public cost of [additional proceedings]," which, it complains, "is enormous and wholly unwarranted." Cert. Petition at 19 n.16. This assertion is irrelevant to finality. The state has no right to immediate interlocutory appeal to escape the costs of litigation. Such costs are the burden that every litigant is expected to bear. Moreover, in this case, the trial has commenced and will be completed within the next week. Accordingly, most of the costs feared by the state will have been incurred by the time this Court disposes of the state's petition for certiorari review.

II. THE COLORADO SUPREME COURT'S INTERIM RULING IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT PRESENT AN ISSUE OF SUCH IMPORTANCE THAT IT REQUIRES THIS COURT'S UNPRECEDENTED INTERFERENCE WITH THE ONGOING STATE COURT PROCEEDINGS.

A. The Colorado Supreme Court's interim ruling is consistent with this Court's precedents.

In its interim ruling, the Colorado Supreme Court determined that Amendment 2 interfered with the right of gay men, lesbians, and bisexuals to participate equally in the political processes "because it bars [this group] from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Evans*, 854 P.2d at 1285. The Colorado court preliminarily determined that:

> Amendment 2 alters the political processes so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw anti-discrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

Id.

The Colorado Supreme Court found that Amendment 2 implicated rights guaranteed by the equal protection clause of the Fourteenth Amendment because the equal protection clause bars states from creating unequal burdens on independently identifiable groups with respect to the right to participate in the political processes, absent a compelling state interest. The Colorado Supreme Court described this fundamental principle as the "common thread which unites" three lines of cases that have addressed the paramount importance of effective political participation in our system of government: the reapportionment cases,[5] cases concerning minority party rights,[6] and cases involving direct restrictions on the right to vote.[7]

In these three lines of cases, this Court established that the right to vote in state elections, although mentioned nowhere in the constitution, is nonetheless a fundamental federal right. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School District*, 395 U.S. 621 (1969). The right to vote is a fundamental right, this Court explained in *Reynolds*, because it is the single means by which most people are able to participate in the process of representative government. Inequalities in voting are suspect because they deny some citizens any

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[5] *See, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[6] *See, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968).

[7] *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

effective voice in enacting policies that substantively affect their lives. *Kramer*, 395 U.S. 621. The state's contention that all three lines of cases concern not a fundamental right to participate but a fundamental "right to vote" (pet. 9-11) ignore this Court's explanation of the reason why there is a fundamental right to vote in state elections. Voting is not a core value in itself; it is, however, a vital tool in the process by which this nation achieves a core constitutional goal – self-government – through elected representatives. *Reynolds*, 377 U.S. at 561, 565.

This Court's opinion in *Hunter v. Erickson*, 393 U.S. 385 (1969), makes clear that the fundamental right to participate equally in self-government goes beyond the right to vote. *Hunter* involved a local charter amendment that, like Amendment 2, repealed existing nondiscrimination laws and forbade the enactment of new ones except by direct popular vote.[8] This Court found the *Hunter* amendment unconstitutional after applying strict scrutiny because it made passage of nondiscrimination laws that would benefit racial, ethnic and religious minorities more difficult than passage of any other city ordinance. 393 U.S. at 391.

But race was not the only issue that this Court addressed in *Hunter*. The Court noted that "the State may

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[8] Unlike the charter amendment in *Hunter*, Amendment 2 does not permit the enactment of civil rights laws at any level, even by popular vote. The repeal of Amendment 2 by a state-wide vote would permit enactment by all the usual means. In this sense, Amendment 2 makes a state-wide constitutional amendment a necessary prerequisite to the passage at any level of Colorado government of civil rights laws that protect lesbians and gay men.

no more disadvantage *any* particular group by making it more difficult to enact legislation in its behalf than it may dilute *any* person's vote or give *any* group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393 (emphasis added). Twice the Court explained that the amendment in *Hunter* was constitutionally offensive because it disadvantaged one particular group by making it more difficult for its members to participate in the political process. 393 U.S. at 391, 392-393. In one instance, this Court referred to the amendment before it as a denial of the right to vote on an equal basis; and, in the other, the Court equated procedures that make it more difficult to enact protective legislation with dilution of voting power. *Hunter*, 393 U.S. at 391, 392-393. In both instances, the Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Avery v. Midland County*, 390 U.S. 474 (1968), two voting rights malapportionment cases that did not involve suspect classifications but rather classifications that discriminated against urban residents and in favor of rural residents. *Id.*; *see* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1917 (1993) (explaining similarity between city charter amendment addressed in *Hunter* and constitutional amendments like Amendment 2).

Although, as the Colorado Supreme Court recognized, *Hunter* speaks clearly to the constitutionality of Amendment 2, the state urges that *Hunter* is simply about "suspect classifications." Pet. at 5-9. If this were the case, however, it would have been pointless for the *Hunter* court to discuss why participation in the political processes is a fundamental right – it simply could have

applied heightened judicial scrutiny based upon a suspect classification analysis.

In addition to ignoring much of the *Hunter* opinion, the state's argument reads too much into this Court's decision in *James v. Valtierra*, 402 U.S. 137 (1971). *James* did not say that *only* those mandatory referenda that affected "suspect classes" were subject to close review. In *Gordon v. Lance*, 403 U.S. 1 (1973), decided six weeks later, the Court held that a mandatory referendum requirement for bonded indebtedness did not deprive the plaintiffs of a fundamental right. In reaching this conclusion, the Court cited and distinguished *Hunter* by noting that it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Gordon*, 403 U.S. at 5. Because the mandatory referendum provisions did not "discriminate against *or authorize discrimination against* any identifiable class, they do not violate the Equal Protection Clause." *Gordon*, 403 U.S. at 7 (emphasis added).

Gordon demonstrates that *Hunter*'s outcome did not depend exclusively on racial classifications and that the state voting rights cases did not depend on literal denials of the right to cast a ballot. If the only value protected by the fundamental right to vote in state elections was the ability to cast a ballot on an equal basis with other citizens, then the analysis of *Hunter* and *Gordon* ought to have ignored the state voting rights cases entirely

because the laws at issue in *Gordon* and *Hunter* did not deny the franchise to anyone. Likewise, if mandatory referenda were suspect only when they disadvantaged "suspect classes," the *Gordon* Court would have cited *Hunter* for that proposition and disposed of the case summarily because the referendum in *Gordon* did not involve a suspect classification. Instead, *Gordon* found that the mandatory referendum requirement was constitutional because it did not "fence out" *any* independently identifiable group from the political process.

There is no dispute in this case that Amendment 2 singles out an identifiable group – gay men, lesbians, and bisexuals. *See* Note, *Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. at 1918 n. 107 (gay men and lesbians constitute an independently identifiable group). Indeed, the terms of Amendment 2 explicitly target this group as the object of the amendment's restrictions. Moreover, there is no doubt that lesbian, gay, and bisexual persons are identifiable independent from the controversy surrounding Amendment 2 or the laws and policies it prohibits. The state's argument now being presented at trial assumes that gay, lesbian, and bisexual persons constitute an identifiable "interest group" united by persistent common interests.[9]

It was on this Court's careful explanations of its rationales in the apportionment cases as well as in *Hunter* and *Gordon* that the Colorado Supreme Court based its

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[9] By contrast, the *Gordon* Court noted that all persons who happened to support bonded indebtedness in different situations had nothing in common apart from their opposition to mandatory referendum requirements for debt of the kind at issue in *Gordon*.

ruling in this case. Because Amendment 2 prevents lesbians, gay men, and bisexuals alone among Coloradans from appealing to legislators and policymakers at any level of state or local government for antidiscrimination legislation, it places, as *Hunter* put it, "special burdens" on their ability to participate in the "governmental process." Amendment 2 is aimed at disadvantaging lesbians, gay men, and bisexuals at every level of Colorado government.[10]

B. The Colorado Supreme Court did not rule that classifications based on sexual orientation are suspect and thus did not contradict any federal circuit court rulings.

As articulated above, the Colorado Supreme Court's interim ruling preliminarily tells the state that it must justify Amendment 2 with a compelling state interest because the amendment implicates *fundamental* constitutional rights. Contrary to the state's allegations, pet. at 11-13, the interim ruling does not rely on the argument that classifications based on sexual orientation are suspect. Indeed, at the very outset of its ruling, the Colorado Supreme Court cites cases holding that gay men, lesbians,

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[10] Petitioners continually suggest that Amendment 2 affects only the power of local government to pass anti-discrimination legislation, and, that like the amendment in *Hunter*, it simply imposes a mandatory referendum. But Amendment 2 destroys the power of Colorado government at any level to pass anti-discrimination legislation. And again, it makes no provision for an override by popular vote, local or state. A statewide vote *amending the state constitution* is a prerequisite to enactment or enforcement of any legislation.

and bisexuals have not been found to constitute a suspect class, and properly states that such precedents – which its decision does not contradict – do not "render the Equal Protection Clause inapplicable to [these groups]." *Evans*, 854 P.2d at 1275. Because this issue was not raised or considered by the court in the interim ruling below, there is no conflict with federal appellate decisions and thus no reason for this Court to review that interlocutory decision.

C. The decision below does not interfere with the interest of the state in enacting appropriate legislation.

The state contends that the interim ruling of the Colorado Supreme Court will "create widespread uncertainty" and improperly "inject the judiciary into matters reserved for the state legislature."[11] Pet. at 13. The state bases that contention on its assumption that the Colorado Supreme Court's interim ruling invalidates all state regulations that preempt local laws or that allocate costs and benefits among groups.

The state's contention is groundless. The state ignores the Colorado Supreme Court's careful delineation of the rights at issue. As a general matter, the simple passage or repeal of legislation does not implicate the fundamental right described in *Hunter* unless simple passage or repeal poses irrational or discriminatory barrier

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[11] The interim ruling of the Colorado Supreme Court *preserves* the power of state and local legislative bodies to act as fora for the enactment of civil rights legislation.

to the political participation of an independently identifiable group. Thus, the interim ruling of the Colorado Supreme Court poses no threat to democratic government.

CONCLUSION

Because the decision appealed from is not a final judgment of a state court, this Court lacks jurisdiction to consider the Writ. As the trial in this matter is currently on-going, this Court should decline to take the extraordinary action of interfering with on-going state court proceedings to review a non-final order that merely preserved the status quo pending full resolution of all of the legal issues in the case. Moreover, the decision below does not conflict with precedents of this Court or of federal circuit courts.

Dated this 18th day of October, 1993.

Respectfully submitted,

JEAN E. DUBOFSKY, P.C.

JEAN E. DUBOFSKY*
1881 Ninth Street, Suite 210
Boulder, CO 80302
(303) 447-3510

JEANNE WINER
Attorney at Law
1942 Broadway, Suite 404
Boulder, CO 80302
(303) 938-6836

GREGORY A. EURICH
HOLLAND & HART
555 17th Street, Suite 2900
P.O. Box 8479
Denver, CO 80201
(303) 295-8166

DAVID H. MILLER
American Civil Liberties
Union of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

MATTHEW A. COLES
WILLIAM B. RUBENSTEIN
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800, Ext. 545

CLYDE J. WADSWORTH
WILSON, SONSINI, GOODRICH & ROSATI
2 Palo Alto Square
Palo Alto, CA 94306
(415) 493-9300

SUZANNE B. GOLDBERG
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
666 Broadway
New York, NY 10012
(212) 995-8585

CITY AND COUNTY OF DENVER
CITY ATTORNEY
DARLENE M. EBERT
Assistant City Attorney
1445 Cleveland Pl., Room 303
Denver, CO 80202-5375
(303) 640-2931

BOULDER CITY ATTORNEY
JOSEPH N. DE RAISMES, III
JANE W. GREENFIELD
P.O. Box 791
Boulder, CO 80306
(303) 441-3020

*Counsel of Record

Attorneys for Respondents